STATE OF MICHIGAN
IN THE SUPREME COURT

Appeal from the Court of Appeals
Donald S. Owens, Presiding Judge

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

-vs-

FREDERICK GOTTSCHALK and
JEFFREY SILAGY,

Defendants-Appellees.

Supreme Court No:
121833 & 121834

BRIEF ON APPEAL - APPELLEES

ORAL ARGUMENT REQUESTED

Michael G. Woodworth (P26918)
Phillip M. Stevens (P21007)
HUBBARD, FOX, THOMAS,
WHITE & BENGTSON, P.C.
Attorneys for Defendants-Appellees
5801 West Michigan Avenue
P.O. Box 80857
Lansing, MI 48908-0857
Telephone: (517) 886-7176

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

Publications

RE-STATEMENT OF ISSUES

I. WHETHER THE ORDER APPOINTING A SPECIAL PROSECUTOR, PURSUANT TO MCL 776.18, AUTHORIZED THE FURTHER INVESTIGATION AND SUBSEQUENT WARRANTS AGAINST, AND PROSECUTION OF, DEFENDANTS SILAGY AND GOTTSCHALK.

Plaintiff-Appellant argues:	"Yes"
Defendants-Appellees argue:	"No"
Circuit Court:	Failed to address this issue although raised by Defendants-Appellees
Court of Appeals said:	"No"

II. WHETHER MCL 49.160, IF IT IS AT ALL APPLICABLE TO ANY CRIMINAL PROCEEDING AGAINST THESE DEFENDANTS, ALLOWS APPOINTMENT OF A SPECIAL PROSECUTOR ON THE FACTS BEFORE THE COURT.

Plaintiff-Appellant argues:	"Yes"
Defendants-Appellees argue:	"No"
Circuit Court:	Failed to address this issue although Raised by Defendants-Appellees
Court of Appeals said:	"No"

REVIEW STANDARDS

Both questions before the Court involve issues of law. Review of the legal contentions is *de novo*. *Oade v Jackson National Life Ins Co*, 465 Mich 244, 250 (2001).

I. COUNTER STATEMENT OF FACTS

Steven Freund, Complainant in this case, was the defendant in a criminal complaint charging him with being responsible for the unlawful filling of a wetland in violation of MCL 281.705(a).[1] This prosecution was begun after Defendant Jeff Silagy made a thorough investigation and after a specially appointed prosecutor concluded that sufficient evidence existed to hold Steven Freund responsible for filling a large wetland area on Little Island Lake in Iosco County.

The misdemeanor prosecution against Steven Freund was dismissed before proceeding to trial. This dismissal was not based on Steven Freund's guilt or innocence.

Following the dismissal of the misdemeanor charge against him, Steven Freund instituted a multi-million dollar civil action against Mr. Silagy and the Michigan Department of Environmental Quality. [Iosco Circuit Court File No: 00-2359-CZ]. The Circuit Court dismissed Freund's Complaint in its entirety in May, 2000. [Appellant's Appendix, pp 64a - 94a]. The Court of Appeals sustained that ruling. [*Freund v Silagy*, et al. COA 228974 unpub Per Curiam June 18, 2002, Defendants-Appellees' Appendix 14, pp125b-130b].

While his civil action was pending, Steven Freund sought to bring perjury charges against Mr. Silagy. Michigan State Police Detective Sergeant Kurt Chubner, at the specific request of the Iosco County Prosecutor, Gary Rapp, conducted an investigation into Steven Freund's claim that Mr. Silagy had committed perjury. After reviewing the officer's report, Prosecutor Rapp concluded there were "no proofs to implicate Silagy as having committed perjury at [Freund's] expense." [Appellees' Appendix 3, p 28b].

---

[1] The Michigan Legislature subsequently codified all of Michigan's laws which pertain to environmental protection. 1995 PA 59. The statute under which Steven Freund was prosecuted is now MCL 324.30304(a). The statutory language remained unchanged by codification.

In mid-February, 2000, Iosco County Prosecutor Rapp petitioned for the appointment of a Special Prosecutor. Prosecutor Rapp made specific, limited, allegations in both his Petition and Affidavit in Support. [Appellant's Appendix pp 45a - 48a]. Pertinent to the appeal now before this Court, the Petition stated:

> *8) That as a result of the complaint lodged by Steven Freund, Gary W. Rapp conducted research to determine if there could be a possibility of criminal charges based upon the allegations of Steven Freund. That such a statute was found regarding a possible/viable charge, that being MCLA 752.11.*
>
> *9) That a Special Prosecutor is necessary to review the facts regarding Steven Freund's allegations. Further, that Gary Rapp would have a conflict in this matter as he is a possible witness regarding conversations he had with Jeff Silagy.*
>
> *10) That Richard W. Queen, Assistant Prosecutor for Iosco County, would be unable to prosecute this case as there would be the appearance of impropriety when the matter went to trial and he called Gary W. Rapp, his employer, to testify.*
>
> *11) That, therefore, Petitioner desires to procure the assistance and appointment of an individual to serve as Special Prosecutor for Iosco County, State of Michigan, to review this complaint, make a determination as to whether a warrant should be issued and to serve in the capacity as Special Prosecutor throughout the pendency of this case only.*

The Affidavit stated:

> *8) That your affiant is aware of the fact that Barry Schantz issued a warrant for the arrest of Steven Freund for a violation of filling wetlands.*
>
> *9) That your affiant became aware that the charges against Steven Freund were dismissed and that Steven Freund requested an investigation of Jeff Silagy regarding statements being false in the Statement in Support of his arrest. Further, that your affiant is aware that the charge of filling a wetland against Steven Freund*

> *was based upon a Statement in Support alleging that "Mr. Freund" did certain acts.*
>
> *10) That your affiant is aware that Detective Kurt Chubner of the Michigan State Police conducted said investigation and turned it over to your affiant for a decision. That it was your affiant's decision that a warrant for perjury would not be authorized.*

Based on Prosecutor Rapp's Petition and Affidavit, Iosco Circuit Judge Richard Ernst issued an Order providing:

> *Upon the reading and filing of the Petition of Gary W. Rapp for the appointment of a Special Prosecutor, and the Court being fully advised in the premises;*
>
> *IT IS HEREBY ORDERED AND ADJUDGED that Maureen Holahan (P24301) is appointed pursuant to MCLA 776.18, as Special Prosecuting Attorney for the County of Iosco, State of Michigan,* ***to serve in the capacity of reviewing the incident report referred to in the attached Petition, making a determination whether a warrant should be issued and to serve during the pendency of that case only.*** [Appellant's Appendix p 49a Emphasis added].

On the very day that Judge Ernst dismissed Freund's civil action 81st District Court Judge, Allen Yenior, issued a criminal Complaint and Warrant charging Mr. Silagy and his DEQ supervisor, Defendant Fred Gottschalk, with four felony counts. Defendants moved to quash the complaints and warrants against them, asserting that the Special Prosecutor had acted in contravention of her appointment and that her appointment was otherwise either unlawful or unconstitutional. The District Court also received briefs on another claim made by Defendants that the Special Prosecutor could never prove her claims under the "common law" because Steven Freund had never been charged with a felony nor had he been acquitted by a jury. [Appellees' Appendix 6, pp 52b-54b].

The District Court heard argument on August 18, 2000. Notwithstanding the plain language of the Circuit Court's Order, or the clear import of Prosecutor Rapp's Petition and Affidavit, District Judge Yenior concluded that Judge Ernst had intended to appoint Ms. Holahan pursuant to MCL 49.160. [Appellant's Appendix pp 138a - 139a]. In the same Opinion and Order, the Court rejected a petition by the Michigan Attorney General to intervene in the prosecution.

The matter proceeded to a preliminary examination in April, 2001. The Court took the Special Prosecutor's motion to bind over under advisement and, on May 9, 2001, issued an Order binding both Defendants over for trial on two of the four charges. [Appellant's Appendix pp 142a - 143a].

An amended Information was filed on May 21, 2001, alleging that Defendant Silagy conspired with Defendant Gottschalk or others to charge Steven Freund with unlawfully filling a wetland in violation of MCL 750.157a. A second count charged conspiracy to obstruct justice in an attempt to indict an innocent man. MCL 750.505 [Appellees' Appendix 8, p 57b]. The information filed against Mr. Gottschalk made similar allegations. [Appellees' Appendix 9, p 58b].

Both Defendants were arraigned in the Circuit Court. Thereafter, Defendants filed motions to quash the Information. Both argued that the Special Prosecutor had produced insufficient evidence at the preliminary examination *"to establish either the requisite elements of the charged offenses or probable cause to believe that defendants committed them."* [Appellees' Appendix 10, pp 59b-67b].

Defendants also moved to dismiss, again renewing their challenges to the appointment and conduct of the Special Prosecutor. [Appellees' Appendix 11, pp 68b-83b].

The Circuit Judge heard argument on Defendants' motions on June 18, 2001. [Appellees' Appendix 12, pp 84b-123b]. The Court denied both motions in an Opinion and Order dated October 23, 2001. While the Circuit Judge explained in some detail why there was sufficient evidence to justify a trial, the Court did not address the defense claims regarding the authority or conduct of the Special Prosecutor. Instead, it summarily denied Defendants' Motion to Dismiss unlawful prosecution. [Appellant's Appendix pp 1a-3a].

Defendants applied to the Court of Appeals for leave to appeal raising several issues. In an Order issued January 3, 2002, but incorrectly dated January 3, 2001, the Court of Appeals granted leave to appeal as to all claims. [Appellees' Appendix 13, 124b]. After argument, the Court of Appeals unanimously ruled that the Special Prosecutor exceeded her statutory authority, and that special prosecutors lack the statutory authority to investigate criminal matters or issue warrants. [Appellant's Appendix pp 4a - 6a].

This Court granted the Special Prosecutor's Application for Leave to Appeal. It held Appellees' cross-appeal regarding the absence of evidence necessary to support the District Court's bind over decision in abeyance pending disposition of the issues presented by the Appellant.[2]

---

[2] Although the Court of Appeals granted Appellees' leave to appeal on this issue, it never reached the question given its decision that the Special Prosecutor exceeded the scope of her appointment, and dismissal of the charges against Appellees was necessary for that reason. However, in the Steven Freund civil action, the Court of Appeals determined that, as a matter of law, no malicious prosecution action could be sustained against Appellee Silagy because the malice element could not be established as a matter of law. [Appellees' Appendix 14, p 128b].

II. ARGUMENT

A. THE LANGUAGE OF THE CIRCUIT COURT'S ORDER APPOINTING SPECIAL PROSECUTOR AND THE STATUTE CITED BY THE COURT CONTROLS THIS CASE.

1. The history of this case demonstrates that Ms. Holahan was appointed as a "special prosecutor" for a limited purpose.

When Iosco County Prosecutor Rapp petitioned the circuit judge, he presented his dilemma as a narrow one. His investigation had disclosed more than he first knew, but, because of his relationship to Steven Freund, and the fact that he could be a witness in any prosecution against Defendant Silagy, a special prosecutor was necessary.

Prosecutor Rapp told the circuit judge that the only prosecution that he could sanction was for violation of MCL 752.11.

There is not a wisp of evidence from Prosecutor Rapp's Petition or Affidavit that he ever considered anyone but Mr. Silagy potentially culpable or even prosecutable. The statute that Prosecutor Rapp relied upon in pursuance of his Constitutional and statutory duties provides:

> *Any public official, appointed or elected, who is responsible for enforcing or upholding any law of this state and who willfully and knowingly fails to uphold or enforce the law with the result that any person's legal rights are denied is guilty of a misdemeanor.*
> MCL 752.11

Consistent with the Petition of Prosecutor Rapp, Judge Ernst entered an Appointment Order.

The Appointment Order is limited in two ways: first, by citation to MCL 776.18, and second, by reference to Detective Sergeant Chubner's Incident Report, and the language "during the pendency of that case only."

The statute relied on by Judge Ernst in an Order either drafted by him, Prosecutor Rapp or Ms. Holahan provides:

MCL 776.18:

> *Sec. 18: The prosecuting attorney may, under the direction of the court, procure such assistance in the trial of any person charged with a felony as he may deem necessary for the trial thereof, and the prosecuting attorney may, under the direction of the court, in case of disability of the prosecuting attorney, appoint an assistant to perform his duties during the disability of the prosecuting attorney, and such assistance shall be allowed such reasonable compensation as the board of supervisors or the board of county auditors in counties having county auditors shall determine, for his services to be paid by the county treasurer upon presenting to said board the certificate of the circuit judge for the county for which such services were performed, certifying to the services rendered by such assistant: Provided, that no person or attorney shall be employed or appointed as assistant who is interested as attorney or otherwise in any case involving the same facts or circumstances involved in the cases to be conducted or tried by said assistant, or who has received any compensation from any other person or persons who are interest in such cases.*

The very words of this statute make it clear that Ms. Holahan is not a substitute prosecutor. Moreover, the statute does not confer any powers beyond the Petition and the Order entered by Judge Ernst.

2. District Judge Yenior acted in excess of his authority by rewriting Judge Ernst's Order.

It is not true, as is urged by Appellant, that "all parties" agree that MCL 49.160 controls these proceedings. [See Appellant's Brief on Appeal at p. 5]. It does not, because Judge Ernst's Order, on its face, says so.

Defendants' lawyers have consistently objected to the District Court's rewriting of Judge Ernst's Order. [See Appellees' Appendix 4 at p 44b, Appendix 11, at p 82b and Appendix 12 at p 86b]. No judge of any inferior court has the power to transmogrify a clear, unambiguous, order from a judge who is his superior.

In Michigan, judges speak through their orders. *Boyle v Berg*, 242 Mich 225, 227 (1928); *Michigamme Oil Co v Huron Valley Building & Savings Assn* 280 Mich 12, 14 (1937); *Miskinis v Bement*, 325 Mich 404, 405 (1949); *Tiedman v Tiedman*, 400 Mich 571, 576 (1979), and *Johnson v White*, 430 Mich 47, 53 (1988).

Because there is no dispute about the words of the Order entered by Judge Ernst, and because, given the chance to explain, he refused to do so, the words of his March 2, 2000, Order control.

Judge Yenior had no authority to rule that Ms. Holahan was appointed under any other law. In this regard, the Court of Appeals' ruling reached the right result, but employed defective, improper reasoning.

B. APPOINTMENT OF A "SPECIAL PROSECUTOR" BY JUDGE ERNST WAS, ON THE FACTS OF THIS CASE, UNLAWFUL.

1. The rationale of the federal "separation of powers" doctrine is only a guide.

The United States Constitution contains no specific language regarding separation of judicial, executive and legislative powers. The "separation of powers" doctrine developed over the course of time, from the early days of our nation.

The United States Supreme Court has repeatedly held that the "separation of powers" doctrine diffuses power to preserve liberty. *Youngstown Sheet and Tube Co v Sawyer*, 343 US 579, 635; 72 SCt 863; 96 LEd2d 1153 (1952). Equally important, the Court has repeatedly followed the injunction found in a warning by the French philosopher, Montesquieu, that "there can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates." *The Federalist No 47, p 325 (J. Cooke ed, 1961).*

The federal separation of powers doctrine may be violated in two ways. One branch may interfere with another's performance of its constitutionally assigned function. See, e.g. *Nixon v Adm'r of General Services*, 433 US 425, 433; 97 SCt 2777; 53 LEd2d 867 (1977); *U.S. v Nixon*, 418 US 683; 94 SCt 3090; 41 LEd2d 1039 (1974). Alternatively, the federal doctrine may be violated when one branch assumes a function that properly belongs to another. See, e.g. *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579; 72 SCt 863; 96 LEd 1153 (1952); *Springer v Philippine Islands*, 277 US 189, 203; 48 SCt 480; 72 LEd 845 (1928).

Where a sitting circuit judge arguably attempted to enlarge the scope of a co-equal prosecutor's power to investigate and charge citizens with crime, he surely crossed the line. *Ins v Chadha*, 462 US 919, 945-946; 103 SCt 2467; 77 LEd2d 317 (1983).

To the extent the Michigan Legislature, via MCL 49.160, sought to enlarge the power of a non-elected public prosecutor, it too violated long established separation of powers doctrine. *Springer,* supra.

2. Michigan Constitutional provisions control this case.

The Michigan Constitution has several provisions applicable to this case:

Art. III §2 provides:

> *The powers of government are divided into three branches: legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.*

Art. VII § 4 provides:

> *There shall be elected for four-year terms in each organized county a sheriff, a county clerk, a county treasurer, a register of deed, and a* ***prosecuting attorney****; whose duties and powers shall be provided by law. The board of supervisors in any county may combine the offices of county clerk and register of deeds in one office or separate the same at pleasure.*

Art. VI § 14 provides:

> *The clerk of each county organized for judicial purposes or other officer performing duties of such office as provided in a county charter shall be clerk of the circuit court for such county. The judges of the circuit court may fill a* ***vacancy*** *in an elective office of county clerk or prosecuting attorney within their respective jurisdictions.*

Art. VI § 27 provides:

> *The supreme court, the court of appeals, the circuit court, or any justices or judges thereof, shall not exercise any power of appointment to public office* ***except as provided in this constitution***. [Emphasis added].

C. THE CLEAR, PRECISE, PROHIBITIONS OF MICHIGAN'S CONSTITUTION CONTROL THE OUTCOME HERE.

Notwithstanding some attempt by this Court to overlay all of the Federal separation of powers doctrine onto Michigan Jurisprudence, see, *Blank v Department of Corrections*, 462 Mich 103, 113-115 (2000), the Court must resist that temptation for two reasons.

First, Michigan's separation of powers doctrine is a part of its written Constitution. Art. III §2. Further, the mandate is crystal clear - - except as found in the Constitution itself, no legislature may act in a judicial manner, and no judge may legislate or act as an executive.

Second, Art. VI §27 absolutely precludes judicial powers of appointment - - except as provided in the 1963 Constitution.

Third, Art. VI §14, the only Constitutional article allowing judicial appointment, requires "a vacancy".

Finally, in Michigan, Art. VII, §4 makes the county prosecuting attorney a Constitutional official - - a Constitutional executive whose lawful power is equal to that of the circuit judge.

1. Michigan courts have jealousy guarded the prosecutor's function against judicial and legislative encroachment.

Michigan courts have assiduously applied the separation of powers doctrine to prohibit judicial interference with prosecutorial decisions regarding those functions reserved for that office. In *Genesee Prosecutor v Genesee Circuit Judge*, 386 Mich 672 (1972), this Court overturned a circuit judge's attempt to require allowance of a plea to a lesser offense over the objection of the county prosecutor. The Court acknowledged that the county prosecutor is a Constitutional officer, 1963 Constitution, Art. VII, §4, and that his decisions regarding the conduct of the prosecution were executive acts. *Id.,* p. 683. In setting aside the plea, Justice Williams wrote:

> *For the judiciary to claim power to control the institution and conduct of prosecutions would be an intrusion on the power of the executive branch of government and a violation of the constitutional separation of powers. Const. 1963, Art. 3, § 2. It also violates our fundamental sense of fair play. Genesee Prosecutor at p. 684.*

The Michigan statutes quoted above provide for the appointment of a special prosecutor, ***but only*** in very limited circumstances. Consistent with the strict limitation on circuit judges' powers by virtue of two constitutional limitations on judicial authority, Michigan appellate courts have held that a circuit judge may not appoint a special prosecutor in a case like this.

In *People v Davis*, 86 Mich App 514 (1978), lv den, 406 Mich 894 (1978), the court examined the special prosecutor statute, as it then existed, and held that no circuit judge had the authority to appoint a special prosecutor to investigate possible criminal activity, issue warrants and initiate a prosecution. Relying on much earlier precedent, *Sayles v Circuit Judge*, 82 Mich 84 (1890), and an identical statute from the mid-nineteenth century, the Court of Appeals said that

an Isabella County Circuit Judge who appointed a special prosecutor under circumstances not unlike those in this case exceeded his authority.

In *Sayles*, the circuit judge appointed a special prosecutor under a statute which preceded MCL 776.18 and MCL 49.160. The court held that the Constitution and statutes relied on by the circuit judge, like the statutes here, did not authorize him to make such an appointment. The Supreme Court wrote:

> *The Constitution (section 10, Art. 6) authorizes the circuit judge, within his jurisdiction, to fill a vacancy in the office of prosecuting attorney. How. Stat. §§ 663, 664, also confer this power authorized by the Constitution; but the provisions of the Constitution and the statute evidently refer to vacancies, and to no other cases or conditions.*
>
> How. State. §559, provides that:
>
> *The Supreme Court, and each of the circuit courts, may, whenever there shall be no prosecuting attorney for the county, or when the prosecutor shall be absent from the court, or unable to attend to his duties, if either of said courts shall deem it necessary, by an order to be entered in the minutes of such court, appoint some other attorney at law to perform, for the time being, the duties required by law to be performed in either of said courts by the prosecuting attorney, who shall thereupon be vested with all powers of such prosecuting attorney for that purpose.*
>
> *This section plainly refers to cases arising in or pending in those courts, and not to cases out of such courts. Section 560 provides that the prosecuting attorney may, under the direction of the court, procure assistance in the trial of any person charged with the crime of felony; but this does not cover the case of the appointment of Mr. Durand, as the prosecuting attorney is not asking his appointment. One attorney has been appointed by the circuit judge on the application of the prosecuting attorney, and upon his conduct of the case Sayles has been discharged. We are not prepared to say that even Mr. Lovell's appointment was valid under the ruling of this Court in Beechler v Anderson, 45 Mich 547, 548. It was held in that case that the prosecuting attorney was required to appear and prosecute complaints before a magistrate only when the magistrate requested it; and it was intimated that,*

> *while it would be best for the magistrate to govern his action by the advice of the prosecuting attorney when he did appear, the justice was not bound always to follow it. And there is no law preventing any party from taking part on behalf of the people in the examination of the accused before a magistrate, if such magistrate and the prosecuting attorney do not object, and there is no good reason for forbidding it. Such examination is an investigation, and no harm can be done the accused or the people by the fullest inquiry.*
>
> *But the circuit judge cannot appoint a special prosecuting attorney to investigate a charge of crime, or to conduct an examination before a justice of the peace. The circuit judge is a conservator of the peace, but that does not authorize him to appoint any one act as a public prosecutor, except in his own court, in cases over which he has jurisdiction. Even then his power is statutory. Nor would it be for the public interest to permit a complaining witness, or other person interested to permit a complaining witness, or other person interested in a criminal prosecution, before the case reaches the circuit court, to petition the circuit judge to depose the prosecuting attorney, even if such attorney is confessedly disqualified from acting as prosecutor. If this were allowed, the circuit courts would be applied to, in almost every criminal inquiry or prosecution, to set aside the prosecuting attorney because of his inaction or bias, and to appoint some attorney in his stead; because, if the prosecuting attorney performs his duty in such cases, as he should, in the interest of the whole people, the complaining witness is seldom satisfied.*

In a more recent case, *In re Special Prosecutor*, 122 Mich App 632 (1983), lv den 417 Mich 1086 (1983), the Court of Appeals once again upheld, on fundamental separation of powers doctrine, the earlier limitations imposed in *Davis* and *Sayles*. The court's ruling was consistent with earlier case law, despite an amendment to the statute via 1978 PA 535. The court said:

> *We must now consider the language the statute as amended to see if its scope would encompass the proposed appointment herein. Subsections (1) and (2) of the amended statute limit the appointment of a special prosecutor to the purpose of performing the duties of the prosecuting attorney "in the respective court in any matter in which the prosecuting attorney is disqualified" and "to perform the duties of the prosecuting attorney in the probate court, the district court, or any other court within the county in any*

> *matter in which the prosecuting attorney is disqualified". [Emphasis supplied] MCL 49.160, subds (1) and (2); MSA 5.578, subds (1) and (2) as amended by 1978 PA 535.* ***We agree with the trial court that the above subsections do not allow the circuit court to appoint a special prosecutor to perform the duties of the prosecuting attorney in any matters outside of the aforementioned courts, including the investigation of complaints of a crime or for the purposes of initiating criminal charges.***
>
> *Decisions regarding the initiation of criminal charges are discretionary executive acts. In deference to principles of separation of powers, judicial interference with the exercise of this discretion is severely limited. Genesee Prosecutor v Genesee Circuit Judge, 386 Mich 672; 194 NW2d 693 (1972); People v Thomas, 118 Mich App 667; 325 NW2d 536 (1982).* ***If the amended statute were interpreted as allowing the appointment of a special prosecutor to initiate criminal charges, even for legitimate reasons such as conflict of interest, the court's appointment of a special prosecutor would constitute a judicial second-guessing of the prosecutor's actions.*** *Because such an action by the court is suspect under constitutional principles, we hesitate to make such an interpretation of this statute, since the statute does not explicitly provide for that kind of judicial power. Once a case is brought, the substitution of a special prosecutor does not constitute such an obvious interference with prosecutorial discretion.*
>
> ***The recommended remedy herein is for petitioners to request the Attorney General to review their complaint and rule on same pursuant to the authority granted under MCL 14.28; MSA 3.181 and MCL 14.30; MSA 3.183.*** *In re Special Prosecutor at pp. 635-637; Emphasis added.*

In an even more recent case, *People v Herrick*, 216 Mich App 594 (1996), the Court of Appeals once again reviewed the parameters of MCL 49.160 and held that a prosecutor's decision not to proceed was not a "conflict" under the statute, even to the point that the circuit judge could not invoke the special prosecutor statute to support a "citizens arrest" claim. The court ruled:

> *We are unwilling to create a definition of "conflict of interest" that would include a prosecutor's decision not to prosecute. In effect,*

such a construction would divest prosecutors of their executive discretion by making a particular exercise thereof grounds for the appointment of a special prosecutor. In our view, such a result would constitute a clear violation of the principle of separation of powers permitting the judiciary to overrule the prosecutor's exercise of executive discretion. See Special Prosecutor, supra at 635-636; People v Davis, 86 Mich App 514, 521-522; 272 NW2d 707 (1978).

For these reasons, we hold that the trial court erred as a matter of law in ruling that the prosecutor's decision not to prosecute constituted a conflict of interest within the meaning of MCL 49.160; MSA 5.758. Because there was no other basis to authorize the appointment of a special prosecutor in this case, we reverse.

* * *

Nor does the statute that authorizes citizens to seek an arrest warrant grant a corresponding right to have charges filed and prosecuted pursuant to the warrant. See, e.g. Sayles v Newton, 82 Mich 84, 90-91; 46 NW 29 (1890); see also Linda R S Richard D, 410 US 614, 619; 93 SCt 1146; 35 LEd2d 536 (1973) ("in American jurisprudence . . . a private citizen lacks a judicially cognizable interest in the prosecution or non-prosecution of another"); Anderson v Norfolk & WT Co, 349 F Supp 121, 122 (WD Va, 1972) ("criminal statutes can neither be enforced by civil action . . . nor by private parties"); Manning v Municipal Court Roxbury Dist, 372 Mass 315, 317-318; 361 NE2d 1274 (1977) (same). Serious constitutional questions would arise regarding the judiciary's ability to initiate criminal charges if the court-approved issuance of a citizen's warrant were to trigger the appointment of a special prosecutor. We cannot accept such a construction because it would be inconsistent with our duty "to give the presumption of constitutionality to a statute and construe it as constitutional unless the contrary clearly appears." Caterpillar, Inc v Dep't of Treasury, 440 Mich 400, 413; 488 NW2d 182 (1992), quoting People v McQuillan, 392 Mich 511, 536; 221 NW2d 569 (1974). Herrick at pp 600-602.

In Sayles, supra, at 89-90, our Supreme Court held that a circuit court may appoint a special prosecutor only in cases that are currently pending within its jurisdiction. See also People v Davis, 86 Mich App 514, 521-522; 272 NW2d 707 (1978). Despite some minor changes in the statutory language, this Court has recently construed MCL 49.160; MSA 5.758 in a similar fashion. Special

> *Prosecutor, supra at 635-636. In each case, it was held that a special prosecutor could not be appointed to investigate or initiate a criminal charge. Sayles, supra at 90; Special Prosecutor, supra at 635-636.* ***Thus, it appears that the authority to appoint a special prosecutor is limited to those cases where charges have been brought and it is later discovered that the prosecutor is unable to act or is disqualified by reason of conflict of interest.*** Sayles, supra at 90; *Special Prosecutor*, supra at 635-636; *Davis* supra at 521-522. [Emphasis added].

In *Herrick,* the Court of Appeals once again said that relief lay with the Attorney General:

> *Finally, the special prosecutor argues that if his appointment is found to be invalid, the case may nevertheless be continued by the Attorney General. In the present appeal, this issue is not before us. We acknowledge that the Attorney General has the authority to initiate criminal charges in any jurisdiction in the state. In re Lewis estate, 287 Mich 179, 183, 184; 283 NW 21 (1938); People v Karalla, 35 Mich App 541, 543-544; 192 NW2d 676 (1971). Thus, the Attorney General acts as a check on the discretion of the county prosecutor. Further, we note that in the present case the Attorney General coauthorized the extortion complaint. However, the Attorney General has not filed an appearance or participated in these proceedings. Accordingly, it is unclear whether the Attorney General has made a decision to prosecute defendant. Herrick* at p. 602.

Finally, in *People v Anterio Williams*, 244 Mich 249 (2001), the circuit judge dismissed serious felony charges, concluding that because the complaining witness ignored a subpoena to appear, she did not want to continue the prosecution. Ruling that the trial judge had transgressed Art. III §2, the Court of Appeals said:

> *This case presents yet another instance where a trial court usurped the prosecutor's exclusive authority to decide whom to prosecute. In so doing, the trial court committed a violation of the constitutional separation of powers. See Genesee Prosecutor v Genesee Circuit Judge, 386 Mich 672, 683-684; 194 NW2d 693 (1972); People v Williams, 186 Mich App 606, 609-612; 465 NW2d 376 (1990); Const 1963, art 3, §2. In a slightly different context, this Court in People v Morrow, 214 Mich App 158; 542 NW2d 324 (1995), exhaustively surveyed the law in this area. That*

> *discussion need not be repeated here. The Morrow Court concluded that the decision whether to dismiss a case or proceed to trial ultimately rests in the sole discretion of the prosecutor. Id. At 165. In the present case, the trial court's decision constituted an invasion of the prosecutorial prerogative, and therefore the trial court's decision is necessarily an abuse of the trial court's judicial authority.*

In the *Williams* case, the circuit judge based his decision to dismiss the prosecution, in part, on his conclusion that the complainant's failure to appear controlled, and hers was the decision not to continue with the prosecution. Citing Art. VII §4, the Court of Appeals panel said:

> *The trial court relied on the notion that because the victim and defendant were involved in a personal relationship, this assault amounted to a private, rather than a public, crime. The trial court further opined that it was the victim's right to have the charges dismissed because she had evidenced a desire not to prosecute.*
>
> * * *
>
> *The authority to prosecute for violation of those offenses is vested solely and exclusively with the prosecuting attorney. Const 1963, art 7, § 4; MCL 49.153; MSA 5.751. A prosecutor, as the chief law enforcement officer of a county, is granted the broad discretion to decide whether to prosecute or what charges to file. People v Jackson, 192 Mich App 10, 15; 480 NW2d 283 (1991); Williams, supra at 609.*
>
> * * *
>
> *However, nowhere in the laws of this state have crime victims been given authority to determine whether the code has been violated or whether the prosecution of a crime should go forward or be dismissed.*
>
> *In the present case, for the trial court to characterize the offense as a private crime and to suggest that the victim has a legal right of any kind to decide whether defendant is prosecuted is clearly inconsistent with the concept of public prosecutions of criminal offenses. Certainly, in the context of civil proceedings for intentional torts, a private party may initiate and pursue a claim*

> *through our court system. However, a civil action is completely separate and independent from a criminal action.* ***Put simply, in criminal cases, the prosecutor alone possesses the authority to determine whether to prosecute the accused.*** *Genesee, supra; Morrow, supra at 165; Jackson, supra; Williams, supra.* [Emphasis added].

It is clear from the plain terms of the statutes, and more than one hundred years of application of the current Act and its predecessor, that the authority of a circuit judge is strictly circumscribed by the statute itself and Michigan's Constitution.

The Special Prosecutor claims that such a reading of the statute could render a prosecutor the "perfect victim", i.e., one who could be assailed without fear of prosecution. This is simply wrong. If a prosecutor is the victim of a crime, he or she may file charges and then either invoke the statute or refer the matter to the Attorney General. In its Amicus brief filed with the Court of Appeals, the Attorney General also noted thatthe alternative charging mechanism of a one man or citizens' grand jury, MCL 767.3 and MCL 767.1, would be available in such a circumstance.

Prosecutor Rapp, in preparing and filing his Petition for Appointment of Special Prosecutor made it clear that he had already considered and rejected the possibility of filing a perjury charge against Defendant Silagy. In addition, he researched the possibility of an alternative charge and identified MCL 752.11 as a potential basis for prosecution.

Thus, the chief law enforcement officer of Iosco County had already performed the investigatory and discretionary charging functions of his office and Attorney Holahan could not permissibly undertake a subsequent and broader investigation or authorize the issuance of charges under a statute different from the one identified by the prosecutor. This is true for the reasons previously set forth and because the Circuit Court Order of Appointment must be narrowly construed as a matter of constitutional law.

Attorney Holahan was to "review . . . . the [Chubner] Incident report, [make] a determination of whether a warrant should be issued, and . . . .serve during the pendency of that case only". As Mr. Rapp had already refused to issue a perjury warrant against Defendant Silagy, the only remaining "case" was the one identified by him: a potential misdemeanor prosecution under MCL 752.11. The Court of Appeals was correct in concluding that the investigation conducted and charges brought on behalf of Steven Freund by the Special Prosecutor exceeded the limitations imposed upon her appointment.

2. The facts of this case illustrate the wisdom underlying Michigan's strict separation of powers doctrine.

Defendant-Appellee, Jeff Silagy, has been called upon to defend against a criminal prosecution in Iosco County, initiated by a special prosecuting attorney who was unlawfully appointed, for a common law offense that cannot be proven, because he attempted to perform his job duties for the Michigan Department of Environmental Quality.

Defendant-Appellee, Fred Gottschalk, now retired from State employment, is facing the same prosecution because, for a time, he was Jeff Silagy's supervisor and because the charged (but patently inapplicable) offense requires a conspiracy and the special prosecutor recognizes a conspiracy and the special prosecutor recognizes that it is legally impossible for one to conspire with himself.

A special prosecutor with limited, if any, criminal law experience, appointed under an inapplicable statute. Archaic common law offenses, the elements of which are impossible to establish. Why would such a legally and factually untenable prosecution be undertaken in the first instance? Why would it be judicially sanctioned? Why would a motion filed by Michigan's Attorney General to Intervene and Assume Jurisdiction be denied as "inimical to the interest of

the public"? The answer is as troubling as it is apparent. It is reflected in the following exchange between the Special Prosecutor and the DNR's former Regional Manager, Richard Sikkenga:

> *Q. [By Special Prosecutor Holahan] Now, Mr. Sikkenga, the Department of Environmental Quality has never, at least while you were there, had never prepared a county-by-county wetland inventory, did it?*
>
> *Mr. Woodworth: Objection, Your Honor. The Department of Natural Resources, the Department of Environmental Quality is not on trial in this case. This is about Mr. Gottschalk and Mr. Silagy, and the charges are very specific. This is irrelevant.*
>
> *The Court: Well, I think there probably is some relevance as to what they knew or didn't know that would be the basis of whether or not Mr. Freund should or shouldn't have been charged is my limited understanding of where we're going here.*
>
> *Ms. Holahan: Yes, Your Honor, your limited understanding is correct.*
>
> *The Court: Overruled.*
>
> * * *
>
> *Q. [By Special Prosecutor Holahan] Okay. And in 1992, there was a case that came down in Iosco County Circuit Court involving Roger McIntosh, correct?*
>
> *A. [By Witness Richard Sikkenga] I recall the name. I don't recall if it was in the court or not, but I recall the name.*
>
> *Q. Now, I am going to show you Exhibit Number 24, and can you tell me what that is?*
>
> *A. Well, it's a memo from Fred Gottschalk.*
>
> *Q What's the date?*
>
> *A. July 1, 1992.*
>
> *Q. Read the body of the memo, please?*

A. 'Attached is the Iosco County Circuit Court's decision in our case against Roger McIntosh. Although I don't agree with Judge Ernst's findings, as long as his opinion stands in Iosco County, we may have a great deal of difficulty enforcing the wetlands act in Iosco County. Part of Judge Ernst's objection to our case deals with the issues of contiguous.

There are vast areas in Iosco County that are swamp that at this point may be hard to regulate due to the difficulty in proving they are contiguous. At this time, I would like to see our Division give a high priority to completing the wetland inventory in Iosco County. Then, as I interpret section 2(g)(ii), we do not have to prove contiguous.

I would like you to take this matter to the Chief during your next meeting and explain our situation. Thanks in advance for your help. Fred'

Q. And did you respond to that?

A. I don't recall.

Q. Do you recall going to the Chief with that discussion?

A. No, I don't.

Q. Did you have any discussions with Mr. Gottschalk about following the Judge's decision?

A. I can't directly say whether we did or not.

Q. Would it be important to have your person, who was working directly for you, follow the law of the county in which that officer, or that employee intends to bring an action?

A. Well, the c ounties don't make laws.

Q. The courts in the counties have - -

A. (Interposing) They don't make laws.
Q. [By Ms. Holahan] You don't think they make laws? [Tr., Preliminary Examination conducted April 20, 2001, pp 84-85, 86-87].

Judge Ernst's decision in the matter of *People v Robert Dale McIntosh*, has no proper place in this prosecution.[3] Yet, from its inception, Special Prosecutor Holahan has listed Mr. McIntosh as a witness and indicated her intent to try the impact of the Circuit Court's *McIntosh* decision upon the enforceability of Michigan's wetland protection laws in Iosco County. Any remaining doubt regarding the true nature of these proceedings was dispelled by the District Court's Opinion and Order binding Defendants over for trial:

> *Both Defendants had knowledge of Judge Ernst's opinion in People v McIntosh, Iosco County Circuit File No. 01-7917-AR, and its ramifications on Goemare-Anderson wetlands in Iosco County.* [Appellant's Appendix 142a - 143a].

It is hard to conceive of a case that better illustrates the wisdom underlying Michigan's strict separation of powers doctrine than the one presently before the Court of Appeals. Appellees believe that the District and Circuit Courts below abandoned the impartiality righfully expected of our judiciary in an effort to further develop a local "common law" restricting, or at least chilling, wetland enforcement proceedings within Iosco County. Their belief is not without record support:

- As Judge Ernst's selection to serve as a special prosecutor, Attorney Holahan admittedly has limited criminal experience. She has, however, dedicated herself to collecting "example after example" of what she perceives to be DEQ transgressions. [Appellees' Appendix 7, p 56b].
- In his *People v McIntosh* Opinion, Judge Ernst raised issues never advanced, briefed or argued by the parties and suggested the possibility of equal protection and due process violations emanating from the language of Michigan's wetland protection laws as interpreted and applied by the DNR. [Appellees' Appendix 1, p 18b].

---

[3] [See Appellees' Appendix 1, pp1b-19b] In *People v McIntosh*, Judge Ernst held that the word "contiguous" as used in Michigan's wetland protection law to identify regulated wetlands requires bogs, swamps or marshes to touch or be in physical contact with a lake, pond, river or stream. One need only refer to Appellees' Appendix, p 20b to confirm that there can be no legitimate dispute but that the wetland at issue with respect to the complainant, Steven Freund, is contiguous to a lake.

- Judge Ernst's Order appointing Ms. Holahan cited MCL 776.18 as statutory authority for her appointment. The Order was essentially rewritten by District Court Judge Allen C. Yenior when he concluded that Judge Ernst really intended to make the appointment under MCL 49.160. [Appellant's Appendix p 138a]. Appellees challenged this amendment by the District Court when they presented their Motion to Dismiss for Unlawful Prosecution to Judge Ernst after being bound over to circuit court. Yet, despite the critical, indeed constitutional, importance of the issue, Judge Ernst refused to address it. In fact, he summarily denied Appellant's Motion without engaging in *any* analysis of the prosecutorial appointment issue. [Appellant's Appendix 1a - 3a].
- After appointing Attorney Holahan but before obtaining jurisdiction over the criminal charges brought against Appellees, Judge Ernst was informed by the complainant's civil counsel that the prosecution was underway. He reacted as follows:

> *"Mr. Duke: Thank you, your Honor, and for your information, a warrant was sworn out this [May 20,2000] afternoon for Mr. Silagy and the other co-conspirator by the Special Prosecutor.*
>
> *The Clerk: Four count felony warrant on each one.*
>
> *The Court: Issued by?*
>
> *The Clerk: Magistrate*
>
> *The Court: Special Prosecutor for?*
>
> *The Clerk: Maureen Holahan, authorized by Jennifer Huebel.*
>
> *The Court: Good.*
>
> *Mr. Duke: Thank you, your Honor.*
>
> *The Court: I say good. If justice is served it's good"*
> [Appellant's Appendix pp 94a - 95a].

No judge can be the enforcer of his own jurisprudence via criminal prosecution. No prosecutor may prosecute on the basis that the laws these defendants sought to enforce are unreasonable. *Tumey v Ohio*, 273 US 510; 47 SCt 437; 71 SCt 749 (1927); *Ward v Village of Monroeville,* 409 US 57; 93 SCt 80; 34 LEd2d 267 (1972); *Taylor v Hayes*, 418 US 488; 94 SCt 2697; 41 LEd2d 897 (1974); and *Bordenkircher v Haynes,* 434 US 357, 365; 98 SCt 663; 54 LEd2d 604 (1978).

III. CONCLUSION AND RELIEF

"Truth - that long clean, clear, simple, undeniable, unchallengeable, straight and shining line, on one side of which black is black and on the other white is white, has now become an angle, a point of view." William Faulkner, "On Privacy", Essays, Speeches and Public Letters. (1965).

This case is black and white.

Appellees Jeffrey Silagy and Fred Gottschalk have been charged with un-proveable felony offenses by a special prosecutor who was either unlawfully appointed or impermissibly exceeded the scope of her appointment. Perhaps our wetland protection laws are in need of revision. Perhaps the rules promulgated by the agency charged with their enforcement are flawed. The proper forum for statutory reform is the Legislature. The appropriate method of challenging agency rules can be readily ascertained by reference to the Administrative Procedures Act. Nowhere is a criminal prosecution against state employees sanctioned or justified to accomplish the objectives underlying in this prosecution. MCL 776.18 does not authorize the appointment of a special prosecutor under the facts of this case. But this statute is the one relied upon by Judge Ernst when he appointed Ms. Holahan.

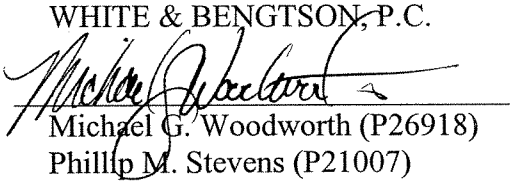
MCL 49.160 is not applicable here. If the Legislature attempted, via MCL 49.160(3), to enlarge the authority of the Circuit Judge to allow him to substitute the charging authority of Prosecutor Rapp, it did so unlawfully, and, on the facts of this case, unconstitutionally.

Defendants urge that the Supreme Court affirm the Court of Appeals or deny relief on the basis that leave to appeal was improvidently granted.

Respectfully submitted,

HUBBARD, FOX, THOMAS,
WHITE & BENGTSON, P.C.

Dated: December 20, 2002

By: 

Michael G. Woodworth (P26918)
Phillip M. Stevens (P21007)
Attorneys for Appellees
5801 West Michigan Avenue
P.O. Box 80857
Lansing, MI 48908-0857